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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF OHIO, :

Petitioner, :

vs. :

CAROLYN YOUNG, :

Respondent. :

NO. 80-237

MOTION TO PROCEED IN FORMA PAUPERIS ON APPEAL

Respondent respectfully moves this Court for an Order permitting her to proceed on appeal in forma pauperis without prepayment of fees and costs as provided under Section 29 U.S.C. 1915(d), because, Respondent is unable to pay such costs or give security therefor. In support of this Motion, Respondent would point out that she is presently proceeding in the above captioned case in forma pauperis and therefore, should be premitted to proceed on appeal in forma pauperis.

Respectfully submitted,

BRETT GOODSON
Attorney for Respondent
20 West Ninth Street
Cincinnati, Ohio 45202
621-2999 (513)

Dated: 9-12-80

IN FORMA PAUPERIS AFFADAVIT
UNITED STATES SUPREME COURT

State of Ohio

Petitioner

vs.

Carolyn Young

Respondent

Case No. 80-237

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, Carolyn Young, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

STATE OF OHIO)
)ss:
COUNTY OF HAMILTON)

Carolyn Young, the Petitioner herein, being first duly sworn, says that the facts stated herein are true as she verily believes.

CAROLYN YOUNG

Sworn to before me and subscribed in my presence this 2 day of September 1980.

NOTARY PUBLIC

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October Term, 1980

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Petitioner

vs.

CAROLYN YOUNG

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

THOMAS P. LONGANO
Assistant Prosecuting Attorney

F. DAVID ALBANESE
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court and Main Streets
Cincinnati, Ohio 45202
(513) 632-8553

Attorneys for Petitioner

BRETT C. GOODSON
Attorney at Law
20 West Ninth Street
Cincinnati, Ohio 45202
(513) 621-2999

Attorney for Respondent

QUESTION PRESENTED FOR REVIEW

Was the Supreme Court of Ohio correct in concluding that Ohio Revised Code Section 2923.04 is void for vagueness under the Due Process Clause of the Fourteenth Amendment because of the failure of that statute to establish ascertainable standards of guilt?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Ohio Supreme Court and the Court of Appeals of Ohio, First Appellate District, delivered in this case are set forth in the appendix to the petition for certiorari. The opinions of the Court of Common Pleas, Cuyahoga County, Ohio, and the Court of Appeals of Ohio, Eighth Appellate District, in the case which was consolidated with the instant case in the Supreme Court of Ohio and which was decided at the same time and in the same opinion as this case by the Ohio Supreme Court under the caption State of Ohio v. Forbes, et al. are set forth in the appendix to this brief, infra, beginning at page A1.

ARGUMENT

I. THE SUPREME COURT OF OHIO CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES IN CONCLUDING THAT OHIO REVISED CODE SECTION 2923.04 IS UNCONSTITUTIONALLY VAGUE.

It is firmly established by the decisions of this Court that a statute is unconstitutional if it lacks ascertainable standards of guilt and is so vague, imprecise and indefinite that persons of ordinary intelligence cannot know what is forbidden and must guess at its meaning and differ as to its application. Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972).

The reasons that vague laws violate "the first essential of due process of law"[1/] are deeply rooted in our constitutional heritage. First, all citizens are entitled to fair warning as to what conduct on their part will or will not expose them to criminal liability. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, supra, at 306 U.S. 453 (footnote omitted). As this Court put it in Grayned v. City of Rockford, supra, at 408 U.S. 108:

> "...because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of

---

1/ Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

> ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." (Footnote omitted).

Second, vague laws invite arbitrary, discriminatory and erratic enforcement of their loosely worded prohibitions. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Calautti v. Franklin, ____ U.S. ____, 99 S.Ct. 675 (1979).

> "...if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, supra, at 408 U.S. 108-109 (Footnotes omitted).

Four courts in the State of Ohio--the Court of Common Pleas of Cuyahoga County, a unanimous Court of Appeals for the Eighth Appellate District, a unanimous Court of Appeals for the First Appellate District and the Ohio Supreme Court--correctly applied these basic precepts in concluding that Ohio Revised Code Section 2923.04 is unconstitutionally vauge.[2/] The petition for certiorari advances no special reason why this Court should review the conclusion reached independently by four Ohio courts that a statute of the State of Ohio is unconstitutionally vauge. Review

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2/ The opinions of the Court of Common Pleas of Cuyahoga County and the Court of Appeals for the Eighth Appellate District are set forth in an appendix to this brief, infra at A1-A15. The Ohio Supreme Court's decision and the decision of the Court of Appeals for the First Appellate District are appended to the Petition for a Writ of Certiorari at pp. 1a-39a.

by this Court is particularly inappropriate in view of the Ohio Supreme Court's determination that, as a matter of state law, it could not accept the petitioner's invitation to place a narrowing judicial gloss on the statute in order to save its constitutionality without rewriting the statute, doing violence to the legislative intent and usurping the function of the state legislature. As a result, in this Court the petitioner is left with the argument that the statute, as written and without any clarifying or limiting judicial construction, is sufficiently precise and definite to withstand constitutional attack.

Ohio Revised Code Section 2923.04 reads as follows:

> "(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
>
> (1) Organize or participate in organizing a criminal syndicate or any of its activities;
>
> (2) Provide a material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
>
> (3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
>
> (4) Furnish legal, accounting, or other managerial services to a criminal syndicate;
>
> (5) Commit, or conspire to attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;
>
> (6) Commit, or conspire or attempt to commit or act as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, 'criminal syndicate' means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22 or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, in intoxicating or spiritous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain.

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time."

At the outset, it should be emphasized that this statute defines a most serious offense--a first degree felony. A person convicted under this statute may be imprisoned for a period of twenty-five years and fined Ten Thousand Dollars ($10,000.00).

See Ohio Revised Code Section 2929.11(B)(1) and (C)(1). Enacted in 1974, the statute has no counterpart under former Ohio law; it was designed to define an entirely new offense in the State of Ohio. See Committee Comment on Chapter 2923 of the Revised Code set forth in Page's Ohio Revised Code Annotated immediately preceding Revised Code Section 2923.01.

The language chosen by the legislature to mark the boundaries of this new offense called "engaging in organized crime" is remarkable, not only because of its complexity at first glance, but because, upon analysis, it defines a seemingly unascertainable number of separate and distinct offenses. Given the repetitive use of the disjunctive "or" in each clause of section 2923.04, and given subsection (C)(7)'s incorporation by reference of the entire criminal code of Ohio, it would require a mathematician of considerable skill even to attempt to compute how many distinct offenses are defined by the statute, let alone what conduct is prohibited by each. To say about Section 2923.04 that "men of common intelligence must necessarily guess at its meaning and differ as to its application"[3/] is an understatement, indeed.

The Supreme Court of Ohio used an apt illustration to demonstrate the impossibliity of ascertaining what this statute purports to proscribe:

> "The defects in the statute...are highlighted when the statutory subsections are read together with their definitional subsections.

3/ Connally v. General Construction Co., supra, at 269 U.S. 391.

For example, the ordinary person is expected to comprehend the following:

> "'No person, with purpose to facilitate any of the activities (R.C. 2923.04(A)) of five or more persons, collaborating to engage in (R.C. 2923.04(C)) any offense for gain (R.C. 2923.04(C)(7)), shall attempt to commit any offense of a type in which a criminal syndicate engages on a continuing basis (R.C. 2923.04(A)(5)).'
>
> "The statute read in this manner, as it must be under certain circumstances, gives no notice of what conduct is proscribed. It indicates the General Assembly's failure to meaningfully define this offense." (Appendix to Petition for Certiorari at 16a).

In order to illustrate the extent to which section 2923.04 is fatally infected with vagueness, it is important to dissect the statute and analyze more closely various of its component parts. A careful scrutiny of some of the most glaring examples of vagueness found in the statute will confirm the correctness of the decisions of the courts below and will reveal the insubstantiality of the questions presented for this Court's review by petitioner.

A. The Vagueness of the Definition of "Criminal Syndicate."

The cornerstone of Ohio Revised Code Section 2923.04 is the term "criminal syndicate." Under subsection (C) of the statute, a criminal syndicate is defined as five or more persons collaborating to promote or engage in any one of several specified offenses on a continuing basis or collaborating to promote or engage in any offense, for the purpose of gain, on a continuing basis. Under subsection (D), it is provided that the various members of the criminal syndicate need not even know the identity

of the other members and that the membership need not remain the same but may fluctuate from time to time.

It is immediately apparent that this definition, upon which the entire statute is built, is sweeping in its scope. As the court stated in Amusement Devices Assn. v. Ohio, 443 F. Supp. 1040, 1049 (S.D. Ohio 1977), in its opinion declaring subsection (A)(4) of Ohio Revised Code Section 2923.04 unconstitutional:

> "We note that this statute is not narrowly drawn to proscribe only particular areas of 'organized' criminal activity. Rather, the statute operates to transform any criminal offense of an economic nature, no matter how petty, into one of Ohio's most serious classifications of criminal activity, a felony of the first degree, so long as the offense entails a conspiracy of five or more persons on a 'continuing basis." For example, 'public gaming,' which under R.C. 2915.04 includes placing a bet while at any place of public accomodation, is a minor misdemeanor in the absence of any prior gambling offenses. Under R.C. 2929.29(A) and (D), a minor misdemeanor carries a maximum fine of One Hundred Dollars ($100.00) and no possibility of imprisonment. If, however, such an offense is engaged in by a 'syndicate' of five or more persons on a 'continuing basis,' the organized crime statute is triggered and an offender could receive twenty-five (25) years in jail or a Ten Thousand Dollar ($10,000.00) fine, or both." (Emphasis added).

The roster of potential felons under this statute is astonishing, to say the least. It could include the two-table bridge group composed of surburban housewives who, once a month, travel downtown for a one-hour luncheon and fail to deposit dimes in the parking meter. It could include the family of five who return from their vacation each year with an unpurchased towel from their favorite motel. A group of five secretaries who work in a downtown office may, much to their amazement, find themselves

caught in the web of this statute should they conceive and carry out the following scheme: once a week, a different member of the "syndicate" deposits 15¢ into a newspaper vending machine; she opens the door and, instead of retrieving the one newspaper to which her payment entitles her, she takes two newspapers, one for herself and one to be read by her co-workers during their coffee breaks. The possibilities are limitless under this vaguely worded and broadly framed statute. Section 2923.04 "attempts to cover so much that it effectively covers nothing." Musser v. Utah, 33 U.S. 95, 97 (1948).

Nor has the statute been narrowed by judicial construction. On the contrary, the Ohio Supreme Court specifically declined to rewrite the statute in an attempt to save its constitutionality. That court's interpretation of this statute, an interpretation which is binding on this Court, [4/] confirm that the statute fails to give adequate notice of its prohibitions:

> "...the criteria chosen by the General Assembly to mark the boundaries of the statute are extremely broad and bring many activities within the statute that would not normally be considered to be conduct engaged in by organized crime. Five persons who participate in a betting pool each time they attend a football game would fall within this definition of a criminal syndicate because their conduct constitutes a violation of R.C. 2915.04, governing public gaming. These persons, however, without clear notice that they are committing a felony of the first degree and are thus subject to a possible jail sentence of 25 years and a $10,000 fine. The nature of their conduct itself does not

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[4/] Brown v. Ohio, 431 U.S. 161, 167 (1977); Garner v. Louisiana, 368 U.S. 157, 169 (1961); Aero Mayflower Transit Co. v. Board of R. Comrs., 332 U.S. 495, 499-500 (1947).

> indicate to them the penalties that are possible." (Appendix to Petition for Certiorari at 11a-12a).

By its all-encompassing definition of "criminal syndicate," the legislature has failed to preform its responsibility of supplying an objective and ascertainable standard of guilt designed to result in even-handed enforcement of the law. Instead, it has delegated "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis." Grayned v. City of Rockford, supra, at 480 U.S. 108-109.

Even the requirement that offenses must be comitted "on a continuing basis" by five or more persons before they may qualify as a criminal syndicate is hopelessly vague. What does the phrase "on a continuing basis" mean? Is the commission of two offenses within the span of six months sufficient? Is the annual commission of an offense enough if it occurs during three consecutive years? Does the commission of five offenses over a period of ten years qualify? The answers to these questions cannot be found in the statute. Citizens of Ohio are simply not given fair warning of the point at which their conduct will render them guilty of a first degree felony, the most serious class of offense in Ohio, excepting the offense of murder. As the Supreme Court of Ohio correctly observed:

> "Due to the fact that there is no definition of what constitutes a 'continuing basis' this basic policy decision is impermissibly delegated to prosecutors and judges for resolution on an ad hoc basis." (Appendix to Petition for Certiorari at 15a).

Moreover, the legislature's selection of five as the number of persons whose collaboration in an enterprise is necessary

to establish the enterprise as a criminal syndicate is irrational in the context of a statute which qualifies as a criminal syndicate a group of persons engaged on a continual basis in any offense, no matter how high or petty, for purpose of gain. For example, under this statutory definition, an organization of four persons whose business is to extort money from storeowners in the inner city by threatening them with destruction of their businesses or with serious bodily harm is immune from prosecution under section 2923.04. Similarly, a loansharking enterprise of four persons who charge usurious interest and enforce repayment by breaking arms and legs is not a criminal syndicate under section 2923.04. But a group of five persons who regularly book a room at the local Holiday Inn for the purpose of playing together in a low-stakes poker game would be considered a criminal syndicate under the statute and would be subject to prosecution for engaging in organized crime. Such a statutory scheme is nothing less than capricious and arbitrary.

The definition of "criminal syndicate," upon which the entire statute is built, is unconstitutionally vague.[5/]

5/ The petitioner cites Ohio Revised Code Section 190.83 at page 4 of its petition as one of the statutory provisions involved in this case. That statute defines "organized criminal activity" for purposes of a legislative grant of authority to the Attorney General of Ohio to investigate organized crime activity in the state. The Ohio Supreme Court concluded that that definition, which does not appear in Ohio's criminal code, does not limit, relate to or affect the definition of "criminal syndicate" found in Ohio Revised Code Section 2923.04, the statute at issue here. (Appendix to Petition for Certiorari at 12a). This Court is, of course, bound by that interpretation of state law. Brown v. Ohio, supra; Garner v. Louisiana, supra. Thus O.R.C. 109.83 has nothing to do with the present case.

B. The Vagueness of Subsection (A).

While subsections (C) and (D) of Ohio Revised Code Section 2923.04 define what a criminal syndicate is, subsection (A) sets forth the conduct which, in connection with a criminal syndicate, is prohibited. Under subsection (A), a person is guilty of engaging in organized crime if he engages in any one of several listed courses of conduct "with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities." (Emphasis added).

It is important to note that it is altogether unnecessary for one to be a member of a criminal syndicate in order to be criminally liable under Revised Code Section 2923.04. One need only commit a single act which is designed to maintain or facilitate any of the activities of a criminal syndicate composed entirely of other persons.

More importantly, subsection (A) requires no proof that the accused knew that his conduct assisted the illegal activities of a criminal syndicate. Under the statute, a person is guilty of engaging in organized crime if he intends to facilitate any of the activities of a criminal syndicate, including those activities of a criminal syndicate which, standing alone, are lawful.

Nor is there any requirement that a person know he is aiding a criminal syndicate. A person who, by his conduct, intends to facilitate any activity of an organization which, in fact, is a criminal syndicate is guilty of engaging in organized crime, whether or not he knows that the organization is engaged in criminal activity.

The Ohio Supreme Court confirmed that, as a matter of state law, this is the correct interpretation of the plain language of the statute. Thus, the Ohio Supreme Court authoritatively construed the statute as follows:

> "First, in viewing division (A) of R.C. 2923.04, we recognize that a person must act with a 'purpose to establish or maintain a criminal syndicate or to facilitate any of its activities,' to be brought within the statute's prohibitions. The General Assembly clearly provided a scienter requirement of 'purpose' as defined by R.C. 2901.22(A). The statute, however, does not demand that this purpose must be manifested in the facilitation' of a syndicate's illegal activities.
>
> . . .
>
> "There is a second independent problem with the scienter requirement in R.C. 2923.04(A). This problem results because there is not requirement that a person know that his actions are aiding a criminal syndicate." Appendix to Petition for Certiorari at 7a, 9a).

Subsection (A) of Ohio Revised Code Section 2923.04 effectively dispenses with any requirement of guilty knowledge or criminal purpose and imposes strict criminal liability upon any citizen who intentionally engages in conduct which, in fact, facilitates the activities of a criminal syndicate, even if the citizen had neither the intention of furthering criminal activity nor knowledge that his conduct would have that result. This Court has long recognized "that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." Colautti v. Franklin, _____ U.S. _____, 99 S.Ct. 675, 685 (1979); see Papachristou v. City of Jacksonville, supra; Smith v. California, 361 U.S. 147 (1959);

Screws v. United States, 325 U.S. 91, 101-102 (1945). The lack of proper scienter requirement in subsection (A) of Ohio Revised Code Section 2923.04 renders that statute fatally vague because citizens have no way of knowing when their conduct may subject them to prosecution under it.

Subsection (A) of Ohio Revised Code Section 2923.04 is impermissibly vague for the additional reason that the term "facilitate" is undefined. As the Ohio Supreme Court correctly observed:

> "No guidance is given in this statute as to the point at which incidental assistance to a criminal syndicate is transformed into 'facilitation,' which will render one open to harsh criminal sanctions. It is also not clear whether one must act affirmatively to be brought within this term, or whether a person by failing to act may be found to 'facilitate' the activities of a criminal syndicate. One trying to ascertain whether his conduct is unlawful under this provision must guess at the meaning of the statute, contrary to the demands of due process of law.
>
> . . .
>
> "as it stands the statute indicates that there may be a conviction for 'facilitation' on evidence that would not support a conviction for aiding and abetting. The statute, however, nowhere indicates the degree to which an individual's conduct must tie him to a particular criminal venture." (Appendix to Petition for Certiorari at 13a-14a).

C. The Vagueness of Subsection (A)(1).

Under subsection (A)(1) of the statute, a person is guilty of engaging in organized crime if he "organize(s) or participate(s) in organizing a criminal syndicate or any of its activities." (Emphasis added). This provision provides yet another example of the vagueness which permeates the entire law.

Here again, this subsection prohibits anyone from organizing any activities of a criminal syndicate. But a criminal syndicate can easily engage in many forms of business, including legitimate enterprises. Is a person guilty of a felony under this provision if he organizes only the legitimate aspect of the syndicate's empire, even if he is unaware of the organization's criminal activities?

The statute simply fails to provide fair notice of its prohibitions.

D. The Vagueness of Subsection (A)(2).

Subsection (A)(2) of Ohio's organized crime law broadly imposes criminal liability on all persons who "provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit." The constitutional deficiencies of the organized crime statute are underscored dramatically by the natural questions that arise from subsection (A)(2).

Does this subsection impose criminal liability upon every legitimate supplier of goods, services or credit in Ohio who unwittingly transacts business with any person who is a member of a "criminal syndicate" and who, subsequently, uses the goods, services or credit supplied to further any of the syndicate's activities, including the noncriminal activities of the syndicate? Is a retail store owner guilty of a felony when the tools he sells are used by the purchaser and his four confederates to burglarize homes on a regular basis? Is the retail store owner guilty when he sells paper, pencils and pens to an organization which uses

these goods to facilitate a forgery scheme or a securities fraud or to engage in bookmaking?

What if the retail store owner knows, or has reason to believe, that his customer is part of an operation which is in the business of bookmaking? Is the store owner a felon if he sells pens, pencils and paper to the bookmaker in the same manner that he would sell the same supplies to any other customer?

Does every business in Ohio open to the public act at its peril when it furnishes goods or services to customers without first taking steps to preclude any possiblility that it will, thereby, be furnishing material aid to a criminal syndicate? Is every business open to the public in Ohio prohibited by the organized crime statute from ever transacting business with any person whom the business suspects <u>may</u> be engaged in a criminal organization?

It is no answer to these questions to suggest that the organized crime statute would not be used to trap <u>all</u> of the unwitting citizens portrayed in the foregoing examples, for the point is that the statute fails to give the members of the public any guidance as to what conduct on their part <u>will</u> subject them to criminal liability. Moreover, the all-inclusive language of the statute in no way operates to limit the discretion of policemen, prosecutors and juries to apply the terms of the statute unevenly and selectively to <u>some</u> of the persons portrayed in the foregoing examples. And, as this Court observed more than a hundred years age:

> "It would certainly be dangerous if the legislature could set a net large enough to catch

> all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221 (1865).

The Ohio Supreme Court correctly applied the decisions of this Court in holding Ohio Revised Code Section 2923.04 unconstitutionally vague.

E. The Vagueness of Subsection (A)(3).

By subsection (A)(3) of Ohio's organized crime law, it is an offense for any person to "manage, supervise or direct any of the activities of a criminal syndicate, at any level of responsibility." As is the case throughout the entire statute, this subsection fails to distinguish between the criminal and non-criminal activities of the syndicate. Instead, the language of this subsection encompasses any activity of a syndicate. It purports to impose criminal liability upon any manager, supervisor or foreman employed by a business which, as part of its various activities, engages in any offense for gain on a continuing basis. Under the language of this subsection, it makes no difference which of the organization's activities are directed by the manager, supervisor or foreman. Proof that he directed the unlawful activities of the syndicate is unnecessary as is proof that he was aware that the business was engaged in criminal conduct.

The common thread running throughout every subsection of Ohio Revised Code Section 2923.04 is that the language used is so vague, imprecise and all-inclusive that wholly innocent conduct can be transformed into a first degree felony. But as this Court stated in Winters v. New York, 333 U.S. 507, 520 (1948):

"Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

F. The Vagueness of Subsection (A)(4).

The vagueness of subsection (A)(4) is particularly dangerous because it impinges upon constitutional rights guaranteed by the First, Sixth and Fourteenth Amendments. Compare Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278 (1961). Subsection (A)(4) makes it a crime for any person to "furnish legal, accounting or other managerial services to a criminal syndicate." Does this subsection prevent a lawyer from representing the members of a syndicate in litigation arising out of their criminal activity? Is a lawyer himself subject to prosecution under this subsection when he defends the members of a criminal syndicate in a prosecution brought under the organized crime statute itself? Is the lawyer or accountant who correctly advises the syndicate that it must report all its income to the federal government, including that obtained from illegal sources, and who assists the syndicate in the preparation of a proper tax return guilty of a felony?

In Amusement Devices Ass'n. v. Ohio, 443 F. Supp. 1040 (S.D. Ohio 1977), the court was presented with a challenge to the constitutionality of this subsection of Revised Code Section 2923.04 After a thorough consideration of the issue presented, the court concluded, in a persuasive opinion, that subsection (A)(4) is both vauge and overbroad, in violation of the Fourteenth Amendment. That decision was plainly correct.

G. The Vagueness of Subsection (A)(5).

Subsection (A)(5) of Revised Code Section 2923.04 imposes criminal liability on all persons who "commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis." (Emphasis supplied). By this subsection, the legislature has altogether abdicated its responsibility to prescribe an ascertainable standard of guilt. Persons of ordinary intelligence must, of necessity, guess at the meaning of this provision and differ as to what offenses may or may not be the kind in which a criminal syndicate engages on a continuing basis.

Even more startling, the legislature, by this subsection, has actually delegated its power to define the offense of "engaging in organized crime" to those who are, in fact, engaged in organized crime. As the Ohio Supreme Court stated:

> "It is the criminal syndicate that will decide what offense to engage in on a continuing basis. Their decision will determine what conduct on the part of others will in the future constitute a violation of R.C. 2923.04(A)(5). Just as a legislative body may not delegate basic policy decision to prosecutors and judges, such matters may not be delegated to the very criminals to be reached under a penal statute. This provision, with its circular wording exemplifies the vagueness that renders this statute unconstitutional." (Appendix to Petition for Certiorari at 15a-16a).

The courts of Ohio have faithfully and correctly performed their duties. Their conclusion that Ohio Revised Code Section 2923.04 is unconstitutionally vauge is clearly right. The petition for certiorari presents no substantial arguments to the

contrary.[6/] There is simply no reason why this Court should review the decision below.

II. NO IMPORTANT QUESTION IS PRESENTED.

Aside from the obvious correctness of the Ohio Supreme Court's decision in this case, particularly in view of the interpretation given to Ohio Revised Code Section 2923.04 by the Ohio Supreme Court, an interpretation which is binding on this Court, there is another reason why this Court should not review this case. The question presented by the petition for certiorari is not of sufficient importance to justify the expenditure of this Court's limited time which would be necessary to give plenary consideration to this case. The petition presents no novel or unsettled question of law. Nor does it raise a question upon which there is a conflict of decisions. There is no disagreement between the petitioner and respondent as to the proper standard to be applied in determining whether or not a statute is unconstitutionally vague. On countless occasions, involving a wide variety of legislative enactments, this Court has established and repeated the governing principles.

The only question presented by this case is whether one state court correctly applied well-defined standards in striking

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6/ As it did in the lower courts, the petitioner has cited decisions upholding the constitutionality of federal criminal statutes pertaining to organized crime. Respondent has no argument with those decision. But as the lower courts concluded, they simply are not relevant to the present case, because the statute at issue here is altogether different from those federal statutes in its purpose, scope, language and every other measurable respect.

down a single state law on grounds of vagueness. The question presented is of little importance outside the State of Ohio. It is simply not the kind of important and far-reaching question which deserves this Court's attention.

CONCLUSION

For the reasons stated, the respondent urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

BRETT GOODSON
20 West Ninth Street
Cincinnati, Ohio 45202
621-2999 (513)

Attorney for Respondent

CERTIFICATION OF SERVICE

I hereby certify that a true and exact copy of the foregoing instrument was delivered to the office of Simon L. Leis, Prosecuting Attorney of Hamilton County, Ohio, Attorney for Petitioner, this 12 day of September, 1980.

BRETT GOODSON
Attorney for Respondent

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 40897

STATE OF OHIO

APPELLANT

-vs-

GEORGE FORBES, ET AL.

APPELLEES

APPEAL FROM

COMMON PLEAS COURT

No. CR-43577

JOURNAL ENTRY

AND

OPINION

DATE AUG 9 1979

CORRIGAN, J.:

This cause came on to be heard upon the pleadings and the ..... transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Defendant-appellees, George Forbes, Ceasar Moss, James Boyd, Carlton Rush, Curtis Watkins, Carl Bayer, David Cohen, Raymond Bona, Eugene Hazen, Thomas Layer, Ernie Mills, and Virgil Shively, were indicted by the Grand Jury on October 30, 1978. The charges against the appellees included engaging in organized crime in violation of R.C. §2923.04.[1/] Prior to the commencement of trial the appellees moved to dismiss the indictment for engaging in organized crime on the grounds that R.C. §2923.04 was unconstitutional. On May 18, 1979, subsequent to a hearing on the motion, the trial court declared the statute to be unconstitutional, granted the appellees' motion; and dismissed the indictment relating

1/ The indictment charged the appellees with violating R.C. §2923.04(A)(1), (2), (3) and/or (5).

to engaging in organized crime. From that order the prosecution filed a timely notice of appeal. One assignment of error has been raised on appeal.

SECTION 2923.04 OF THE OHIO REVISED CODE FULLY COMPORTS WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT PROVIDES A FAIR WARNING OF THE CONDUCT PROSCRIBED.

The sole issue which is before the Court is whether or not R.C. §2923.04 offends the Due Process Clause of the Fourteenth Amendment of the United States Constitution. A discussion of the evidence which underlies the indictments is not relevant to the issue raised on appeal. The statute at issue, Section 2923.04 of the Ohio Revised Code, provides in its entirety:

> "(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
> "(1) Organize or participate in organizing a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
> "(2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
> "(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
> "(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;
> "(5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;
> "(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violance;
> "(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, bribery in violation of section 2921.02 of the Revised Code.
> "(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.
> "(C) As used in this section, 'criminal syndicate' means five or more persons collaborating to promote or engage in any of the following on a continuing basis:
> "(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;
> "(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

"(3) Any theft offense as defined in section 2913.01 of the Revised Code;

"(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

"(5) Illegal trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

"(6) Lending at usurious interest, and enforcing repayment by illegal means;

"(7) Any offense, for the purpose of gain.

"(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time."

The appellees attacked the constitutionality of the organized crime statute in the trial court on the grounds that it was both overbroad and vague. These grounds, while similar and frequently overlapping, are not the same. A statute will be void for overbreadth when the scope of the statute is so broad that it includes activity which would otherwise be legal. Thornhill v. Alabama (1940), 310 U.S. 88, 97. See also Mosley v. Police Department of the City of Chicago (7th Cir., 1970), 432 F.2d 1250, 1258. On the other hand, a statute will be void for vagueness when "men of common intelligence must necessarily guess at its meaning and differ as to its application...." Baggett v. Bullitt (1964), 377 U.S. 360, 367. See generally, Grayned v. City of Rockford (1972), 408 U.S. 104, 108-09.

The issue of the constitutionality of this statute is of first impression in this court. A review of decisions from other courts of appeal in Ohio which have considered this issue reveal that they are not in agreement. In State v. Byars, Case No. 8543, (Ct. App., Summit Cty., filed December 21, 1977), and State v. Houlihan, Case No. 11-CA-78, (Ct.App., Fairfield Cty., filed November 1, 1978), the Courts rejected the argument that P.C. §2923.04 was constitutionally vague. On the other hand, the First Appellate District, in State v. Young, Case No. C-780309, (Ct. App. Hamilton Cty., filed April 4, 1979), held that the statute could not be

reconciled with the Due Process Clause of the Fourteenth Amendment. See also State v. Flynt, Case No. C-77101, (Ct. App., Hamilton Cty., filed April 4, 1979). In addition to these decisions of the courts of appeals, a federal district court has also declared parts of R.C. §2923.04 unconstitutional on the grounds of vagueness and overbreadth. Amusement Devices Ass'n. v. Ohio (S.D. Ohio, 1977), 443 F. Supp. 1040.

A violation of the organized crime statute is a first degree felony. R.C. §2923.04(B). The statute defines a criminal syndicate as five or more persons who collaborate on a continuing basis to either engage or promote 1) extortion or coercion, 2) prostitution, 3) theft, 4) gambling, 5) illegal traffic in drugs, liquor, or firearms, 6) usury, or 7) any other offense for the purpose of gain. R.C. §2923.04(C). In addition, the statute further provides that a criminal syndicate retains its character even t'ough the membership of the group changes or the members do not know the identity of the other members. The first six parts of R.C. §2923.04(C) set out specific offenses. These offenses range in classification from a second degree misdemeanor (coercion)[2/] to a a first degree felony (illegal traffic of drugs)[3/]. The final part includes any offense for the purpose of gain. While the language of this part of the statute may be construed to mean financial gain, it is still broad enough to include a minor misdemeanor such as public gaming[4/]. Thus, under the language of R.C. §2923.04(C), any offense committed for the purpose of gain, involving five or more persons and done on a continuing basis, will be elevated to a first degree felony, regardless of the magnitude of the underlying offense. Moreover, the requirement that the offense be committed

2/ R.C. §2905.12(D).
3/ R.C. §2925.03(D)(6),(7).
4/ R.C. §2915.04(D).

on a continuing basis is not sufficient to limit the application of the statute to established criminal operations. Consequently, five persons who participate in an attendance pool each time they attend a football game would fall within the meaning of a criminal syndicate as that term is defined by R.C. §2923.04(C).

The statute further provides that one is guilty of engaging in organized crime if he either helps to establish or maintain a criminal syndicate or facilitate any of its activities. R.C. §2923.04(A). This section prohibits organizing (R.C. §2923.04(A)(1)), providing material aid (R.C. §2923.04(A)(2)), or managing, supervising, or directing (R.C. §2923.04(A)(3)) either the criminal syndicate or any of its activities. The statute does not provide, however, that the activities of the syndicate which are promoted must actually be illegal. Moreover, the scienter element of the statute is not limited to the commission of illegal activities. As long as the person purposely facilitated an activity of the syndicate, the requisite intent of the element under the statute has been satisfied. Amusement Devices Ass'n, supra at 1051. Thus, a person engaged in a lawful aspect of an organization which is also conducting illegal operations would fall within the scope of R.C. §2923.04, notwithstanding the fact that he may have no knowledge that such illegal activities are being conducted by the organization. In this respect R.C. §2923.04(A) suffers from an overbreadth, for its effect is to impose criminal liability on conduct which would otherwise be legal.

The appellant argues that this defect may be cured by placing a narrow construction on the statute which would limit the scienter element to the commission of illegal activities. Such a construction, however, is not supported by the language of the statute. While a court will attempt to construe the language of a statute in order to sustain its validity,

it will not rewrite the statute to accomplish this same objective.

This portion of R.C. §2923.04(A) is also vague, for a particular course of conduct could be classified as either legal or illegal, depending upon whether or not the conduct facilitated an activity of a syndicate. The legality could not be determined solely on the basis of the conduct itself, but would also be determined upon other factors which the person may or may not be aware of at the time of the conduct. Thus, the statute fails to adequately provide an ascertainable standard of guilt. Cf. Palmer v. City of Euclid (1971), 402 U.S. 544.

In support of his argument in favor of the constitutionality of R.C. §2923.04, the appellant relies on the federal anti-racketeering statute, 18 U.S.C. §1952. The federal courts which have considered this issue have held that the language of 18 U.S.C. §1952 is not vague. See, e.g., United States v. Villano (10th Cir., 1976), 529 F.2d 1046; Turf Center, Inc. v. United States (9th Cir., 1963), 325 F.2d 793. The language of the Ohio and federal statutes, however, is not the same. Consequently, the decisions relating to the constitutionality of the federal statute are not dispositive of the issue which is before this court. Moreover, the federal anti-racketeering statute expressly limits the imposition of criminal liability to unlawful activity. Thus, this statute does not contain the same sweeping prohibitions on activity which are contained in R.C. §2923.04.

The defects contained in the Ohio organized crime statute relate not to the aim of the statute, but to its sweeping scope. The appellant spells out the objective sought by the General Assembly by pointing out "the legislature's purpose in enacting the statute was to prevent the expansion of crime to a point where a group of persons commits criminal acts on a continuing basis as though it were a business enterprise."

It must be recognized that the purpose of the statute is to reduce actual organized crime. In order to accomplish this, it is necessary that the statute apply not only to those persons involved in the actual commission of the offenses listed in R.C. §2923.04(C), but also to those persons who play a less direct but nonetheless essential role in the promotion of the criminal syndicate. As was stated earlier, however, the current statute goes beyond this point to include within its scope those persons who might work for or provide services to the syndicate while engaged in lawful activities. For this reason, the statute suffers from overbreadth, and therefore, it is in conflict with the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In addition, because R.C. §2923.04 fails to provide an adequate standard by which the legality of an activity can be determined, the statute is vague.

The defects which exist might be cured by a redrafting of the statute to limit its scope to criminal conspiratorial activities involving certain monetary amounts and continuing operation over fixed periods of time, as well as gradations of punishment according to the seriousness of the crimes. It is not the role of the court, however, to draft legislation but only to interpret legislative enactments.

The appellant's assignment of error is not well taken, and the judgment of the trial court declaring R.C. §2923.04 unconstitutional is affirmed.

RECEIVED FOR FILING

AUG 9 1979

GERALD E. FUERST

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, P.J.,

STILLMAN, J., CONCUR.

John V. Corrigan, JUDGE

Plaintiff appellant: John T. Corrigan
Defendant appellees: Charles Clarke, Jr., Ralph Sperli, James A. Draper, Charles Mosely, Jr., Stanley E. Tolliver, Leonard Yelsky, Michael C. Hennenberg, Lloyd B. Oliver, Jay B. White, John R. Climaco, Bernard A. Berkman, James R. Willis, Curtis Smith, Gerald S. Gold

This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an instrument of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

IN THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	
vs	:	Case No. CR-43577
CEASAR MOSS, et al	:	
Defendants	:	

DECISION AND ENTRY

This matter is before the Court pursuant to the motions of the various defendants to dismiss various charges wherein it is alleged that the defendants violated 2923.04 of the Revised Code on the grounds that that Statute is unconstitutional in that it is impermissibly overbroad and fails to properly define conduct which shall be considered criminal, thus constituting a violation of the due process clause of the Fourteenth Amendment.

The basic premise is well settled that a Statute violates the due process law of the Fourteenth Amendment if the Statute lacks ascertainable standards of guilt and is so vague, imprecise and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application. See Columbus v. Thompson, 25 O.S.2d 26. It is basic constitutional law that any penal enactment must be sufficiently clear in defining the activity proscribed and that it must contain ascertainable standards of guilt. Compare Winters vs New York, 333 U.S. 507 515. See

Connally vs. General Construction Company, 269 U. S. 385 at 399 wherein the Court states:

> "That the purpose of such requirement is 'to inform those who are subject to it what conduct on their part will render them liable to its penalties. And the statute which either forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"

Compare Columbus vs. Rogers, 41 O.S. 2d 161.

It is against this background that we now turn to the language of the Statute, 2923.04 of the Revised Code. That Statute states as follows:

> (A) no person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
>
> (1) Organize or participate in organizing a criminal syndicate or any of its activities;
>
> (2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
>
> (3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
>
> (4) Furnish legal, accounting, or other managerial services to a criminal syndicate;
> (5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense as a type in which a criminal syndicate engages on a continuing basis;
>
> (6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revisde Code;

(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2914.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, or intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain.

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time."

At the outset it should be noted that the terms of the Statute are such that an individual may be convicted even if one is not aware of all the members of the so-called criminal syndicate even though the membership may change from time to time, and further

that he may be convicted even if the activity of the particular individual is simply something to facilitate "any of its activities". See 2923.04 (A). Thus it becomes apparent that there is no restrictions that the act be done with a purpose of facilitating illegal activities.

In making the determination as to whether or not this Statute passes constitutional muster, the court has the benefit of two rulings which address themselves directly to the issues that are presented in this case. In Amusement Devices Association vs Ohio, 10 003d 235, Judge Duncan of the United States District Court for the Southern District of Ohio, granted a declaratory judgment finding that 2923.04 (A) (4) was, in fact, unconstitutional in that it was impermissibly vague because it failed to define the conduct which it purports to proscribe. He also found that, in fact, the particular sub-section of this statute was over-broad because it reached conduct which was protected under the First and Fourteenth Amendment. In passing, Judge Duncan commented:

> "We note that this statute is not narrowly drawn to proscribe only particular areas of 'organized' criminal activity. Rather, the statute operates to transform any criminal offense of an economic nature, no matter how petty, into one of Ohio's most serious classifications of criminal activity, a felony of the first degree, so long as the offense entails a conspiracy of five or more persons on a 'continuing basis.'" 10 O.O.3d at 243.

Justice Duncan went on to point out in his opinion that the so-called scienter element as found in Paragraph A, i. e. with purpose to

facilitate any of its activities does little to limit the reach of the statute. He points out that, as written, the scienter element is not limited to activities undertaken to facilitate the illegal activities of a criminal syndicate. He points out:

> "This is important; a criminal syndicate may engage in many activities which are not in and of themselves illegal. Some such activities, such as reporting income for federal tax purposes, are in fact required by law. " 10 003d at 244

After citing certain language found in Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278; he continues:

> "We think these comments applicable to the scienter element of R.C. section 2923.04. 'With purpose*** to facilitate any of [a criminal syndicate's] activities' is exceptionally broad language." 10 O.O.3d at 245

The analysis by Judge Duncan as to the problems presented by this overly broad and vague language contained in Paragraph (A) of 2923.04 of the Revised Code is applicable to the provisions of sub-divisions 1, 2, and 3 as well. Once again there is no restriction that the activity be related to any type of illegal activity or action. Thus one may, by engaging in totally proper legal activities "facilitate any of the activities" of the criminal syndicate as defined in this section. The constitutional infirmity of such a statute and such broad sweeping language is self-evident.

In addition to Judge Duncan's decision, the court has the benefit of the decision by the Court of Appeals of the First Appellate District of Hamilton County, Ohio, in State of Ohio vs Carolyn Young, Case No. C-780309, which was filed in the Court of

Appeals on April 4, 1979. A copy of that decision is attached to this decision.

// The Court of Appeals in that decision points out in a cogently written opinion that the vagueness and breadth of the language is such as to constitute a violation of due process in that it fails to give adequate notice to an individual that their activity may be considered illegal. The Court, in addition goes on to point out: //

> "We note also that governmental regulation for the public welfare must be accomplished by methods consistent with due process. A law which is unreasonable, arbitrary and capricious and which selects means that have no real or substantial relation to the result sought to be attained is inconsistent with due process standards. Nebbia v. People of State of New York (1934), 291 U.S. 502, 54 S. Ct. 505. We do not find that a statute so sweeping in its reach as R. C. 2923.04 is reasonably related to the legislature's object in controlling organized crime on a small or large scale. Nor do we see a rational basis for the number five as a borderline for the purpose of denominating activities as 'engaging in organized crime' which otherwise would be classified as misdemeanors. These activities have suddenly been elevated to first degree felonies carrying penalties of a possible sentence of 7 to 25 years in prison and up to a ten thousand dollar fine when five or more people are involved. We find it nothing less than capricious, for instance, that someone engaging in 'public gaming,' a gambling offense encompassed by R.C. 2915.01 which is ordinarily a minor misdemeanor carrying a maximum fine of $100.00 and no possibility of imprisonment, may now be subject to the same punishment as one convicted of aggravated robbery, kidnapping, or rape, if the public gaming is done in concert with four other persons. R. C. 2923.04 (C) (4)."

Based on the foregoing analysis and authorities contained herein, the motions of the defendants to dismiss charges relating to

purported violations of 2923.04 of the Revised Code are hereby sustained for the reason that the statute itself is unconstitutional on its face and an attempt to try to convict an individual under the terms of that statute would constitute violation of due process of law.

GEORGE E. TYACK, JUDGE
BY ASSIGNMENT













